

Protest of) Date: May 6, 1991
MIKE AND CANDACE RUSSELL)
Solicitation No. 900-005-91) P.S. Protest No. 91-13

DECISION

Mike and Candace Russell (the Russells) timely protest the contracting officer's determination that they are a nonresponsible bidder under solicitation no. 900-005-91, issued by the Los Angeles Transportation Management Service Center (TMSC) for the highway transportation of mail from the Santa Ana, CA General Mail Facility to Yorba Linda, CA. The solicitation was issued on December 10, 1990 with bid closing on January 9, 1991. The bid of \$95,897 per year signed by Candace Russell was third low of the 40 bids received. The other bids ranged in amount from \$86,662 to \$201,318 per year.^{1/} After the two lower bidders were determined to be nonresponsible, Mrs. bid became eligible for award.

Because the information submitted with the bid signed by Mrs. Russell was inadequate to establish her responsibility, the contracting officer sent Mrs. Russell a letter on January 17 requesting additional information related to this issue.^{1/} The letter stated the general standards of the Procurement Manual (PM) for determining a contractor

^{1/} The PS Form 7405, Transportation Services Bid or Proposal & Contract, was signed by Candace Russell. The PS Form 7468-A, Highway Transportation Contract- Bid or Renewal Worksheet, indicates the bidder is Candace Russell and Mike Russell, Jr. The Russell's attribute this discrepancy to lack of room on the signature block of PS Form 7405. We need not here resolve whether the discrepancy should have been resolved as a minor informality or irregularity in accordance with PM 12.7.6. See generally, David Guidry, Jr. and Johnny Jackson, d/b/a Guidry and Jackson Trucking P.S. Protest No. 87-133, March 4, 1988.

^{2/} The file indicates that the PS Form 5472, Pre-Award Questionnaire, returned with the bid signed by Mrs. Russell did not show any assets or liabilities. The form also fails to list, in response to question 3 of the questionnaire ("Identify any capacity (E.g., contractor, subcontractor, carrier, driver, etc.) in which the company, its owner, partners, or officers have been engaged in the carrying of the mails within the past five years, if possible identify routes by number and provide name of contractor and contracting officer. If service on any route was terminated by the Postal Service for cause, attach an explanation."), the previous mail experience of Mr. Russell and the fact that a postal contract awarded to him was terminated for default.

responsible (PM 3.3.1) and invited the prospective awardee to submit any additional information which would establish her responsibility citing as examples credit reports, bank statements, income tax returns, profit and loss statements, her driver's record, letters of reference, evidence of her ability to obtain necessary equipment and supplies, and verification that she could obtain required insurance coverage. The letter stated that any information Mrs. Russell wished to submit had to be received by the TMSC by January 22, 1991.

On January 22, the TMSC attempted to contact Mrs. at the phone number she had provided and, when unable to do so, left a message for her. The call was returned by Mike Russell who stated that he had received the January 17 letter and that he would be faxing supplemental information to the TMSC. The TMSC inquired as to Mr. Russell's role in the operation and was informed that he would be working the route together with Mrs. Russell.

The information faxed by Mr. Russell to the TMSC on January 22 included a more complete PS Form 5472 and several pieces of correspondence of related to the equipment and insurance for the equipment to be used in providing service on the route. The PS Form 5472 (second page only) indicated assets of cash in the bank in the middle four figures, real estate, ownership of two tractors, and a late model pickup. It also indicated liabilities related to the real estate, one of the tractors, insurance and the pickup. The correspondence indicated that Mr. Russell was the person to whom the tractor and trailer to be used on the route were leased. He was also identified as the owner of a tractor which would be substituted for the leased tractor during the contract term. The submitted insurance policy quote was directed to Mike Russell.^{4/} During a subsequent review of the submitted information and through conversations with the Russells, the TMSC determined that Mike Russell, doing business as MACME, had been awarded a postal contract administered by the TMSC on September 5, 1990. That contract had been terminated for default on September 15 when Mr. Russell had failed to begin service.

By letter of January 29, the contracting officer informed Mrs. Russell that he was unable to make an affirmative determination regarding her responsibility due to her lack of adequate resources necessary to perform the contract. The contracting officer also indicated that if the resources and experience of Mike Russell were to be considered (that is, if Mr. Russell were also considered as the bidder) he had determined that Mr. Russell's termination for default was indicative of a poor performance record and lack of sound business ethics, and these two factors required a finding of nonresponsibility.^{4/}

^{3/} When asked by TMSC personnel about any mail transportation experience she had, Mrs. Russell stated that she had none but that her husband (Mike Russell) had mail transportation experience.

^{4/} The contracting officer's letter does not make clear what determination he made regarding the ownership of the assets listed on the second Pre-Award Questionnaire forwarded to him on January 22 and how this determination affected his analysis of the responsibility of Mrs. Russell. Although the record is not clear on this point, presumptively, under California law, the assets were the community property of the Russells. Cal. Civ. Code §1110 (West 1991).

By an undated letter, received by the TMSC on February 6, the Russells protested the contracting officer's determination. That letter was forwarded to this office (where it was received February 20) for resolution. Pursuant to PM 4.5.5 a., contract award has been stayed pending the decision in this protest.

In their protest, the Russells allege the January 17 request for additional information did not allow sufficient time for reply (January 22) because the weekend in question included a Monday legal holiday and that "if allotted an appropriate time frame we could have supplied all additional information." Furthermore, the Russells argue that TMSC personnel should have returned the PS Form 7405 for Mr. Russell's signature since its absence was "a simple human error." Finally, the Russells question why they were asked to provide information within 6 business hours, if other bidders were in line for award. They suggest that allotting insufficient time for a response results in a waste of the affected bidder's time.

In his report, the contracting officer agrees that the time allotted for the response to his January 17 letter was unreasonably short and indicates that, in the future, bidders will be allowed at least five business days in which to respond. The contracting officer argues that in this case the shorter time frame was not prejudicial since the bidder did provide additional information and that information was considered in his determination.^{4/}

As to the second issue raised by the protest, i.e., that Mr. Russell should have been allowed to add his name to the P.S. Form 7405, the contracting officer alleges that no such request was made but, in any case, it would have been inappropriate Russell's to do so. Nonetheless, the contracting officer notes that if Mr. Russell's assets and experience were considered, the recent termination for default of Mr. Russell's postal contract would preclude award to the Russells.

In comments on the contracting officer's report, the Russells contend that the only reason for the finding of nonresponsibility in regard to the instant solicitation was the previous default of MACME. The Russells explain that they did not bid in the name of MACME because they did not want it "to be a part of the maze." They state that upon receiving award of this contract, they would "file under another business name not yet known." Further, the Russells allege that, in fact, they did request the opportunity to sign the PS Form 7405 with both of their signatures.^{5/}

^{5/} The issue of the inadequacy of the time allotted for response need not be further discussed. The record does not reflect any questioning of the allotted time frame by the Russells at the time of the contracting officer's request. Nor have the Russells suggested what, if anything, they were unable to provide the contracting officer that would have affected the outcome of his determination.

^{6/} To the degree the conflict here constitutes a factual dispute, we accept the contracting officer's position since the record reasonably supports that position. See Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988; Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988. The file contains two memos to the file of TMSC personnel concerning the signature on the PS Form 7405 and none indicate that the Russells requested that the form be returned so that Mr. Russell's name could be included.

As to the lack of experience Mrs. Russell, the Russells allege that Mrs. Russell indicated to TMSC personnel that she had experience and education in business administration. In any case, they note that the solicitation does not require previous mail transportation experience and, in any case, Mrs. Russell has run a much larger operation than this "small contract." In closing, the Russells state that "[t]his contract was turned down solely on the grounds of the default. If the word [']default['] were removed from the TMSC's statements then this case would never have reached this point."

Discussion

The standard of our review of a contracting officer's finding of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the [requirements of the contract] with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; Cimpi Express Lines, Inc. Russell, P.S. Protest No. 88-57, December 15, 1988.

PM 3.3.1 a. sets forth the reasons for responsibility determinations as follows:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility....

PM 3.3.1 a. PM 3.3.1 e. requires: "[i]n the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility." PM 3.3.1 e.1. To be determined responsible, a contractor must have, inter alia, financial resources adequate to perform the contract (PM 3.3.1 b.1.), a good performance record (PM 3.3.1 b.3.), and the necessary production...and technical equipment...or the ability to obtain them (PM 3.3.1 b.6.).

The contracting officer's determination of nonresponsibility in this case was not arbitrary and capricious and was based on substantial evidence. Recent unsatisfactory contract performance, evidenced by a default termination, can justify a determination of nonresponsibility. Package Express, Inc., P.S. Protest Nos. 87-57, 87-58, 87-64, July 27, 1987; Hunter L. Todd, P.S. Protest No. 85-78, October 18, 1985; Bathey Manufacturing Company, P.S. Protest No. 82-7, March 31, 1982. The fact that a contractor challenges or might challenge a termination does not preclude consideration of the termination in determining responsibility. DWS, Inc., P.S. Protest No. 87-100,

November 6, 1987. Although terminations for default in the distant past cannot be considered by a contracting officer, it is allowable to consider a termination within the recent past. Pamela J. Sutton, P.S. Protest No. 87-110, February 9, 1988 (and protests cited therein). Given the role Mr. Russell was to play in the performance of this contract, a finding of nonresponsibility with regard to the Russells was justifiably based on Mr. Russell's recent default on a postal contract. The Russells cannot avoid this consequence through the substitution of Mrs. Russell or the marital community as the bidder.

Because Mr. Russell's termination for default justified a nonresponsibility determination regarding the Russells' bid we need not decide whether the contracting officer's determination regarding Mrs. Russell's financial responsibility was appropriate.

The protest is denied.

[Signed]

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 5/16/95]